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# FAST FOOD, ZONING, AND THE DORMANT COMMERCE CLAUSE: WAS IT SOMETHING I ATE?

JACKSON S. DAVIS\*

**Abstract:** The obesity rate has risen to epidemic proportions in the United States. Fast food restaurants have recently come under scrutiny for their contribution to the growth of America's waistlines. Communities across the country, recognizing obesity as a issue of serious public health concern, are looking for innovative ways to halt the increasing rate of obesity. One such method is the use of zoning to exclude fast food restaurants entirely, as a matter of public health. Zoning regulations of this type, however, may confront challenges under the dormant commerce clause, which restricts the power of states to burden interstate commerce.

## INTRODUCTION

Fast food has been a staple of the American diet for decades.<sup>1</sup> The abundance of fast food restaurants, though, likely contributes to the steadily increasing obesity rate.<sup>2</sup> In response, communities are beginning to look to zoning regulations as a means to curb the influence of restaurants serving fattening, high-caloric food at great speed and low prices.<sup>3</sup> Zoning regulations aimed at fast food may also encourage the development of healthier alternatives to fast food by altering the built environment.<sup>4</sup>

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\* Managing Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2007–08.

<sup>1</sup> See ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL 6 (2004). Fast food, namely hamburgers and french fries, rose to prominence during the 1950s and has become an image of the “quintessential American meal.” *Id.* According to Schlosser, a “typical American now consumes approximately three hamburgers and four orders of french fries every week.” *Id.*

<sup>2</sup> See *id.* at 240–41.

<sup>3</sup> See JULIE SAMIA MAIR ET AL., THE CTR. FOR LAW & THE PUBLIC'S HEALTH, THE USE OF ZONING TO RESTRICT FAST FOOD OUTLETS: A POTENTIAL STRATEGY TO COMBAT OBESITY 40–53 (2005), available at <http://www.publichealthlaw.net/Zoning%20Fast%20Food%20Outlets.pdf>. The Center for Law and the Public's Health report provides an in-depth look at the variety of ways in which communities have used zoning regulations to restrict the operation of fast food restaurants. See *id.*

<sup>4</sup> See *id.* at 20; James O. Hill et al., *Modifying the Environment to Reverse Obesity*, ENVTL. HEALTH PERSPECTIVES, <http://www.ehponline.org/docs/2005/7812/7812.pdf> (last visited

Local governments enact zoning regulations under the police power.<sup>5</sup> The police power is the ability of state and local governments to regulate for the health, safety, and welfare of a community.<sup>6</sup> The police power was inherited by the states from the English Crown,<sup>7</sup> and states have delegated it to local governments—through zoning enabling laws—to enact zoning ordinances.<sup>8</sup>

Because zoning laws are local in character, zoning ordinances that limit national fast food chains from participating in local markets may trigger scrutiny under the dormant Commerce Clause.<sup>9</sup> The dormant Commerce Clause prohibits state and local governments from placing a burden upon interstate commerce.<sup>10</sup> Under the dormant Commerce Clause, state and municipal laws will be struck down if they are facially discriminatory, discriminatory in purpose, or have a discriminatory effect.<sup>11</sup> This Note will address whether a zoning ordinance that excludes fast food restaurants from a community, when adopted to reduce obesity rates, would withstand scrutiny under police power and dormant Commerce Clause analyses.

Part I will address the obesity epidemic in the United States, its relationship to fast food, and how communities are responding to this growing health crisis. Part II will describe the broad scope of the police power to regulate for the health, safety, morals, and welfare, as well as its relationship to zoning. Part III will cover the evolution of the dormant Commerce Clause doctrine and recent cases concerning commerce and zoning. Part IV will argue that a fast food zoning ordinance would be upheld under both the police power and dormant Commerce Clause analyses.

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Mar. 27, 2008). The built environment refers to the ways in which a community designs and constructs its buildings and public spaces. *Id.*

<sup>5</sup> See JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES § 11.1.1.1 (3d ed. 2002).

<sup>6</sup> DANIEL J. CURTIN, JR. & CECILY T. TALBERT, CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW 1 (26th ed. 2006).

<sup>7</sup> STEVEN J. EAGLE, REGULATORY TAKINGS § 2-2 (3d ed. 2005).

<sup>8</sup> SINGER, *supra* note 5, § 11.1.1.1.

<sup>9</sup> See John M. Baker & Mehmet K. Konar-Steenberg, "Drawn from Local Knowledge . . . And Conformed to Local Wants": Zoning and Incremental Reform of Dormant Commerce Clause Doctrine, 38 LOY. U. CHI. L.J. 1, 41 (2006).

<sup>10</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES § 5.3.1 (1997); see Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 425 n.1 (1982) (providing a brief history of the term "dormant Commerce Clause").

<sup>11</sup> See DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 225-46 (2004).

## I. FAST FOOD AND OBESITY

Obesity has risen to epidemic levels throughout the world.<sup>12</sup> Recent studies have found that 17.1% of American children and adolescents are overweight, while nearly a third of the adult population, 32.2%, is obese.<sup>13</sup> National data have shown that while overall caloric consumption has increased, there has been no corresponding increase in physical activity among adults.<sup>14</sup> Obesity greatly increases the risk of developing many serious medical conditions, including type 2 diabetes, atherosclerosis, hypertension, osteoarthritis, metabolic syndrome, sleep apnea, and certain forms of cancer.<sup>15</sup> The obesity epidemic has turned on its head the traditional food-related problem that has plagued humanity throughout its history: starvation.<sup>16</sup> The shift from concern for insufficient caloric consumption to extreme over consumption is a testament to the relative economic prosperity of the United States and developed nations vis-à-vis the developing world.<sup>17</sup>

“Fast food”<sup>18</sup> restaurants have become a focal point in the debate over obesity.<sup>19</sup> Food at these establishments is generally very high in

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<sup>12</sup> World Health Organization, Obesity and Overweight (2003), <http://www.who.int/dietphysicalactivity/media/en/gsf Obesity.pdf>. The term “obesity” refers to a body mass index of 30 or higher for an adult, while “overweight” refers to a body mass index of between 25 and 29.9. Centers for Disease Control and Prevention, Overweight and Obesity: Defining Obesity and Overweight, <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm> (last visited Mar. 27, 2008). Body mass index is determined by a person’s height and weight, and generally corresponds to the person’s total amount of body fat. *Id.*

<sup>13</sup> Press Release, Nat’l Ctr. for Health Statistics, Obesity Still a Major Problem (Apr. 14, 2006), [http://www.cdc.gov/nchs/pressroom/06facts/obesity03\\_04.htm](http://www.cdc.gov/nchs/pressroom/06facts/obesity03_04.htm).

<sup>14</sup> *Id.*

<sup>15</sup> Stanford Hospital & Clinics, Health Effects of Obesity, <http://www.stanfordhospital.com/clinicsmedServices/default> (follow “Bariatric Surgery for Morbid Obesity” hyperlink under “Clinics”; then follow “Obesity as a Disease” hyperlink under “Bariatric Surgery”; then follow “Health effects of obesity” hyperlink) (last visited Mar. 27, 2008). The myriad negative health effects of obesity have led to staggering medical costs. See *Yum! Brands: Fast Food’s Yummy Secret*, *ECONOMIST*, Aug. 25, 2005, at 60, 61, available at [http://www.economist.com/business/displayStory.cfm?story\\_id=4316138](http://www.economist.com/business/displayStory.cfm?story_id=4316138) [hereinafter *Yum! Brands*]. In 2003 alone, \$75 billion was spent treating obesity-related conditions. *Id.* Much of this cost is passed on to taxpayers. *Id.*

<sup>16</sup> Richard A. Epstein, *What (Not) to Do About Obesity: A Moderate Aristotelian Answer*, 93 *GEO. L.J.* 1361, 1361 (2005).

<sup>17</sup> See *id.*

<sup>18</sup> Fast food may be defined generally as food that “is designed for ready availability, use, or consumption and with little consideration given to quality or significance.” *MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY* 422 (10th ed. 2001).

<sup>19</sup> See *Yum! Brands*, *supra* note 15, at 61. See generally SCHLOSSER, *supra* note 1 (discussing the impact of the fast food industry on American culture). The idea that fast food outlets, such as McDonald’s, Burger King, and Wendy’s, significantly contribute to American obesity has permeated throughout popular culture. *SUPER SIZE ME* (Kathbur Pictures

energy density—the energy content per unit weight—and fat, while providing few nutritional benefits.<sup>20</sup> Humans have a very limited ability to detect energy density, thereby making it difficult to reduce food intake when consuming foods with high energy density.<sup>21</sup> The high energy density of fast food thus “challenges our appetite control systems with conditions for which they were never designed.”<sup>22</sup> A typical meal at a fast food restaurant may account for over eighty percent of the recommended daily allowance for fat, and a single menu item may provide nearly half of a day’s total caloric requirements.<sup>23</sup> Fast food restaurants serve larger portions of food than other restaurants, and even fast food portion sizes have drastically increased in the past half century.<sup>24</sup>

The most significant public health concern presented by fast food chains may be their ubiquity.<sup>25</sup> These establishments can be found on practically every major thoroughfare, in both rich and poor communities.<sup>26</sup> Fast food restaurants have even begun to appear within large churches known as “megachurches.”<sup>27</sup> At these ubiquitous fast food

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2004) (demonstrating the unhealthy effects of eating only meals from McDonald’s over a one-month period through an irreverent documentary film).

<sup>20</sup> MAIR ET AL., *supra* note 3, at 12; A.M. Prentice & S.A. Jebb, *Fast Foods, Energy Density and Obesity: A Possible Mechanistic Link*, 4 OBESITY REVS. 187, 187 n.a, 190–91 (2003). For instance, a typical meal at McDonald’s—consisting of a Big Mac, large french fries, and large Coca-Cola—contains 59 grams of fat, 1420 calories, 75 milligrams of cholesterol, and 1390 milligrams of sodium. See McDonald’s USA, Nutrition Facts for Popular Menu Items, [http://www.mcdonalds.com/app\\_controller.nutrition.index1.html](http://www.mcdonalds.com/app_controller.nutrition.index1.html) (last visited Mar. 27, 2008). A similar meal at Burger King—consisting of a Whopper, large french fries, and a large Coca-Cola—contains 67 grams of fat, 1460 calories, 51 milligrams of cholesterol, and 1845 milligrams of sodium. See Burger King, U.S. Nutritional Information, <http://www.bk.com/Nutrition/PDFs/brochure.pdf> (last visited Mar. 27, 2008).

<sup>21</sup> Prentice & Jebb, *supra* note 20, at 191.

<sup>22</sup> *Id.* Given the high energy density of foods at many fast food restaurants, “[I]t is virtually impossible to select a combination of items that yield even a moderate energy density.” *Id.*

<sup>23</sup> MAIR ET AL., *supra* note 3, at 12. Figures are based on a 2000-calorie diet. *Id.* A recent study showed that “children and adolescents aged 4–19 who ate fast food consumed on average 187 kilocalories per day more than those who did not, which could theoretically account for an additional 6 pounds of weight gain per child per year.” *Id.*

<sup>24</sup> See *id.* at 10–11. The increase in portion size is noteworthy considering that “people tend to eat more when served more.” *Id.* at 11.

<sup>25</sup> See SCHLOSSER, *supra* note 1, at 4–5. There has been a tremendous increase in the number of fast food restaurants in the past thirty years. MAIR ET AL., *supra* note 3, at 15. In 1972, there were only 72,850 fast food restaurants in the country. *Id.* In recent years, however, that number has grown to over 280,000. *Id.*

<sup>26</sup> See SCHLOSSER, *supra* note 1, at 4–5.

<sup>27</sup> See Dan Thanh Dang, *The New Advertising Age: From Eggs to Body Parts, Every Blank Space Seems Fair Game as Marketers Strive to Break Through the Clutter*, BALT. SUN, Aug. 2, 2006, at 1C, available at 2006 WLNR 13342406 (commenting that megachurches are often built

outlets, consumers can purchase tasty meals that are both cheaply priced and quickly served.<sup>28</sup> Perhaps due to the abundance of restaurants, people are eating out more; forty percent of food was purchased away from home in 1995, and fast food comprised thirty-four percent of such purchases in 1997.<sup>29</sup>

While a conclusive link between fast food consumption and the obesity rate has yet to be proven, there is a growing belief that environmental factors are contributing to the rise in obesity rates.<sup>30</sup> The planning of communities to include an abundance of fast food restaurants may encourage people to be more sedentary.<sup>31</sup> Urban design and land-use planning can significantly impact levels of physical activity and access to healthy food.<sup>32</sup> Further, close correlation exists between the spread of American-style fast food restaurants and obesity rates around the globe.<sup>33</sup> As journalist Eric Schlosser has noted, “it seems wherever America’s fast food chains go, waistlines start expanding.”<sup>34</sup>

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with a McDonald’s or Starbucks inside); Sandra Pedicini, *Oviedo Church’s Plan Unnerves Neighbors*, ORLANDO SENTINEL, NOV. 3, 2005, at B1.

<sup>28</sup> Hill et al., *supra* note 4. Fast food restaurants offer meals that are high in fat and sugar, each a relatively low-cost commodity, which allows the restaurants to charge low prices while providing super-sized portions. *Id.* These extremely large portions lead the consumer to believe that they are the beneficiaries of a good deal, which in turn may propel consumers to purchase even more fast food meals. *See id.*; *see also* MAIR ET AL., *supra* note 3, at 11 (noting that “offering larger portions for relatively less money has become a successful marketing strategy for fast food businesses”).

<sup>29</sup> S.A. French et al., *Fast Food Restaurant Use Among Women in the Pound of Prevention Study: Dietary, Behavioral and Demographic Correlates*, 24 INT’L J. OF OBESITY 1353, 1353 (2000); *see* MAIR ET AL., *supra* note 3, at 14 (describing the frequency at which at Americans consume meals away from home).

<sup>30</sup> MAIR ET AL., *supra* note 3, at 9.

<sup>31</sup> Hill et al., *supra* note 4. Restaurants, as well as other businesses such as banks, dry cleaners, and pharmacies, commonly offer drive-throughs, reducing activity levels of their customers. *Id.* By contrast, community plans that facilitate walking to businesses and encourage a reduced reliance on automobiles may help promote physical activity and lower rates of obesity. *See id.*

<sup>32</sup> *See* Richard J. Jackson & Chris Kochtitzky, *Creating a Healthy Environment: The Impact of the Built Environment on Public Health*, in LAW AND THE HEALTH SYSTEM 52, 54–57 (Lawrence O. Gostin & Peter D. Jacobson eds., 2006); Stephanie Strom, *\$500 Million Pledged to Fight Childhood Obesity*, N.Y. TIMES, Apr. 4, 2007, at A9 (discussing how children and the poor often live in areas with limited healthy dietary options, which poses a significant barrier to choosing healthier lifestyles).

<sup>33</sup> *See* SCHLOSSER, *supra* note 1, at 242. For example, the obesity rate among adults and the number of fast food restaurants in Great Britain both roughly doubled during the same time period, between 1984 and 1993. *Id.* Additionally, the British are the largest consumers of fast food in western Europe and have the highest rate of obesity. *Id.*

<sup>34</sup> *Id.*

Communities around the country are enacting creative solutions to this growing public health crisis.<sup>35</sup> Some have proposed enacting a “fat tax” on unhealthy foods,<sup>36</sup> while the New York City Board of Health has adopted two regulations aimed at curbing the negative effects of fast food consumption.<sup>37</sup> The Board first adopted a ban on a particularly unhealthy type of cooking fat, trans fats, often used by the fast food industry.<sup>38</sup> The Board also approved a requirement for fast food outlets to “prominently display the caloric content of each menu item on menu boards or near cash registers.”<sup>39</sup>

Other communities have used zoning regulations to exclude fast food restaurants from their communities.<sup>40</sup> These exclusions can be roughly classified as aesthetic-based zoning ordinances, with some communities enacting total bans, while others have created density restrictions on the number of fast food outlets permitted within a community.<sup>41</sup> Aesthetic zoning regulations ban drive-through restaurants, or fast food restaurants generally, in order to preserve the unique and aesthetic qualities of a community.<sup>42</sup> The town of Concord, Massachusetts, for example, has expressly prohibited “[d]rive-in or fast food restaurants.”<sup>43</sup> Concord justified excluding fast food restaurants as consistent with the stated purposes of its zoning bylaws: to lessen street congestion and maintain the “aesthetic qualities of the community.”<sup>44</sup>

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<sup>35</sup> See Manny Fernandez, *Pros and Cons of a Zoning Diet: Fighting Obesity by Limiting Fast-Food Restaurants*, N.Y. TIMES, Sept. 24, 2006, § 1, at 37; Thomas J. Lueck & Kim Severson, *New York Bans Most Trans Fats in Restaurants*, N.Y. TIMES, Dec. 6, 2006, at A1.

<sup>36</sup> See Mark Tatge, *The Twinkie Tax*, FORBES.COM, Mar. 3, 2004, [http://www.forbes.com/taxes/2004/03/02/cz\\_mt\\_0302twinkie.html](http://www.forbes.com/taxes/2004/03/02/cz_mt_0302twinkie.html).

<sup>37</sup> Lueck & Severson, *supra* note 35, at A1.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See MAIR ET AL., *supra* note 3, at 40–53. While not explicitly tying their zoning regulations to health concerns, these ordinances have the unintended effect of promoting public health. See *id.* at 40.

<sup>41</sup> See *id.* at 40–53.

<sup>42</sup> See *id.* at 40–49.

<sup>43</sup> CONCORD, MASS., ZONING BYLAW § 4.7.1 (2006), available at [http://www.concordnet.org/Pages/ConcordMA\\_BOA/zone/2006ZoningBylaw.pdf](http://www.concordnet.org/Pages/ConcordMA_BOA/zone/2006ZoningBylaw.pdf). Concord’s ordinance defines a “drive-in” or “fast food restaurant” as:

[A]ny establishment whose principal business is the sale of foods or beverages in a ready-to-consume state, for consumption within the building or off-premises, and whose principal method of operation includes: (1) sale of foods and beverages in paper, plastic or other disposable containers; or (2) service of food and beverages directly to a customer in a motor vehicle.

*Id.*

<sup>44</sup> *Id.* § 1.2.

Calistoga, California, is a community that has restricted fast food restaurants through a zoning ban on “formula restaurants.”<sup>45</sup> The ordinance defines a formula restaurant as having “[s]tandardized menus, ingredients, food preparation, uniforms,” as well as similar architecture, logos, business names, or decor of another restaurant located elsewhere.<sup>46</sup> Calistoga’s City Council objected to formula food businesses on aesthetic grounds, charging that formula restaurants would adversely affect the uniqueness of their community.<sup>47</sup> Calistoga’s unique character, according to the City Council, is vital to sustaining its tourism industry.<sup>48</sup>

While Concord, Calistoga, and other similar communities, have regulated fast food outlets out of their communities completely to maintain aesthetics, other municipalities are permitting these types of businesses with limitations as to the total number and density of fast food restaurants.<sup>49</sup> Westwood Village, a section of Los Angeles bordering the University of California at Los Angeles, has enacted an ordinance limiting streets to one fast food restaurant for every 400 feet of lot frontage.<sup>50</sup> Arcata, California, on the other hand, has placed a strict quota restriction on fast food restaurants.<sup>51</sup> In Arcata, no more than nine fast food outlets may exist within the community at any time.<sup>52</sup>

Communities have generally predicated their exclusion of fast food restaurants on aesthetic grounds.<sup>53</sup> A Bronx Councilman, Manuel Rivera, however, has recently proposed a similar zoning regulation restricting the number, or location, of fast food restaurants.<sup>54</sup> Councilman Rivera’s proposal is unique in that his proposal would restrict fast food

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<sup>45</sup> MAIR ET AL., *supra* note 3, at 43; *see* CALISTOGA, CAL., MUN. CODE § 17.04.616 (2007), available at [http://nt5.scbbs.com/cgi-bin/om\\_isapi.dll?clientID=2844908621&infobase=calistoga.nfo&jump=17.04.616&softpage=PL\\_frame#JUMPDEST\\_17.04.616](http://nt5.scbbs.com/cgi-bin/om_isapi.dll?clientID=2844908621&infobase=calistoga.nfo&jump=17.04.616&softpage=PL_frame#JUMPDEST_17.04.616).

<sup>46</sup> CALISTOGA, CAL., MUN. CODE § 17.04.616, (2007), available at [http://nt5.scbbs.com/cgi-bin/om\\_isapi.dll?clientID=2844908621&infobase=calistoga.nfo&jump=17.04.616&softpage=PL\\_frame#JUMPDEST\\_17.04.616](http://nt5.scbbs.com/cgi-bin/om_isapi.dll?clientID=2844908621&infobase=calistoga.nfo&jump=17.04.616&softpage=PL_frame#JUMPDEST_17.04.616).

<sup>47</sup> MAIR ET AL., *supra* note 3, at 43–44.

<sup>48</sup> *Id.* at 44.

<sup>49</sup> *See id.* at 48–51.

<sup>50</sup> WESTWOOD VILLAGE, CAL., SPECIFIC PLAN § 5.B.4 (2004), available at <http://cityplanning.lacity.org/complan/specplan/pdf/wwdvil.pdf>. Westwood’s ordinance defines fast food restaurants generally, describing them as “establishment[s] which dispense[] prepared food over a counter for consumption on or off the premises, except for a cafeteria.” *See id.* § 4.

<sup>51</sup> MAIR ET AL., *supra* note 3, at 49.

<sup>52</sup> *Id.*

<sup>53</sup> *See id.* at 40–53.

<sup>54</sup> Fernandez, *supra* note 35, § 1, at 37.



restaurants in order to fight chronic obesity.<sup>55</sup> Recent reports have demonstrated a high level of obesity among New Yorkers.<sup>56</sup> Rivera hopes to expand the dietary options for those living in low-income communities surrounded by countless fast food outlets.<sup>57</sup> Currently, no municipalities within the United States have enacted zoning regulations excluding fast food restaurants solely as a matter of public health.<sup>58</sup> Councilman Rivera's proposal is one of the first to suggest using zoning laws to directly combat obesity.<sup>59</sup>

## II. THE POLICE POWER TO REGULATE FOR HEALTH, SAFETY, MORALS, AND WELFARE

### A. *Origin and Scope of the Police Power*

The police power is the basis for all land-use regulations in the United States.<sup>60</sup> Broadly, the police power is the capacity of states to regulate for the promotion of public health, safety, morals, and welfare.<sup>61</sup> The power of the state *qua* sovereign to regulate for the health, safety, morals, and welfare is deeply rooted in English common law.<sup>62</sup> The origins of the police power derive from the nuisance concept that a "person may not use his or her property to the detriment of another."<sup>63</sup> Sir William Blackstone likened the police power to domestic

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* Research has indicated that a lack of access to healthy foods may serve as a "significant barrier to healthy eating." MAIR ET AL., *supra* note 3, at 19. The built environment can greatly affect how people eat:

A built environment that has options for purchasing nutritious foods is more conducive to maintaining a healthy weight than one in which the only easily accessible options are high calorie, high fat, fast food establishments. In low-income neighborhoods, fast food may be more available than fresh produce. . . . [N]eighborhoods with the poorest socioeconomic indicators had 2.5 times as many fast food outlets as those neighborhoods in the wealthiest category. While food consumption is a complex behavior, the built environment can make it more or less difficult to make healthy choices.

Wendy C. Perdue et al., *Public Health and the Built Environment: Historical, Empirical, and Theoretical Foundations for an Expanded Role*, 31 J.L. MED. & ETHICS 557, 560 (2003) (footnotes omitted).

<sup>58</sup> See MAIR ET AL., *supra* note 3, at 52–53.

<sup>59</sup> See *id.*; Fernandez, *supra* note 35, § 1, at 37.

<sup>60</sup> CURTIN, JR. & TALBERT, *supra* note 6, at 1.

<sup>61</sup> *Lochner v. New York*, 198 U.S. 45, 53 (1905).

<sup>62</sup> EAGLE, *supra* note 7, § 2-2 to -3; PATRICK J. ROHAN, *ZONING AND LAND USE CONTROLS* § 35.02 (2006).

<sup>63</sup> EAGLE, *supra* note 7, § 2-1.

maintenance of a family, whereby family members are bound to act in accordance with good manners and propriety towards one another.<sup>64</sup> The police powers, originally vested in the English crown, succeeded to the states following the Revolutionary War.<sup>65</sup>

The Framers of the Constitution clearly intended for the states to retain the police powers.<sup>66</sup> The police powers were among the powers reserved to the states that had not been delegated to the federal government.<sup>67</sup> Justice Marshall, in *Brown v. Maryland*, declared that the police power “unquestionably remains, and ought to remain, with the States,” and held that the power to force removal of gunpowder fell within the ambit of the police power.<sup>68</sup>

The police power has been an elusive, difficult-to-define concept.<sup>69</sup> The U.S. Supreme Court first began to elucidate the scope of the police power in the landmark cases *Munn v. Illinois* and *Mugler v. Kansas*.<sup>70</sup> In *Munn*, the Court considered the question of whether the Illinois legislature could fix a maximum rate for grain storage within the state.<sup>71</sup> Upholding the regulation, the Court identified broad power for states to regulate private property under the police power.<sup>72</sup> The *Munn* Court found that Illinois’s statute was a valid assertion of its police power to regulate property that affected the public interest.<sup>73</sup> Chief Justice Waite held that when the use of private property affects public interests there is an implicit grant to the public of an interest in such use.<sup>74</sup> Waite defined public interests in property as when private property is “used in a manner to make it of public consequence, and affect[s] the community

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<sup>64</sup> See WILLIAM BLACKSTONE, 4 COMMENTARIES \*162.

<sup>65</sup> See EAGLE, *supra* note 7, § 2-3.

<sup>66</sup> See THE FEDERALIST No. 31, at 150 (Alexander Hamilton) (W.R. Brock ed., 1970); ROHAN, *supra* note 62, § 35.02(2).

<sup>67</sup> ROHAN, *supra* note 62, § 35.02(2); Susan M. Stedfast, *Regulatory Takings: A Historical Overview and Legal Analysis for Natural Resource Management*, 29 ENVTL. L. 881, 886 (1999); see U.S. CONST. amend. X.

<sup>68</sup> *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827). The *Brown* decision was also the first time the Supreme Court used the term “police power.” EAGLE, *supra* note 7, § 2-3; see *Brown*, 25 U.S. (12 Wheat.) at 443.

<sup>69</sup> MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 120 (2005). “The police power’s defining characteristic [is] its very undefinability. Virtually every definition of the police power [is] accompanied by the remark that it cannot be, and has not been, defined.” *Id.*

<sup>70</sup> EAGLE, *supra* note 7, § 2-3; see *Mugler v. Kansas*, 123 U.S. 623 (1887); *Munn v. Illinois*, 94 U.S. 113 (1876).

<sup>71</sup> 94 U.S. at 123.

<sup>72</sup> See *id.* at 124–26.

<sup>73</sup> See *id.* at 126, 130; Stedfast, *supra* note 67, at 887–88.

<sup>74</sup> *Munn*, 94 U.S. at 126.

at large.”<sup>75</sup> He found that the states maintained the general police powers “necessary for the common good and the security of life and property.”<sup>76</sup> These powers were derivative of all the powers possessed by the English Parliament.<sup>77</sup> Under the police power, states may “regulate[] the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good.”<sup>78</sup> In short, *Munn* recognized expansive powers of state governments to regulate the property interests of their citizens.<sup>79</sup>

*Mugler* concerned the constitutionality of a Kansas prohibition law.<sup>80</sup> The law, an 1880 amendment to the state constitution, prohibited the manufacture and sale of intoxicating liquors.<sup>81</sup> The act stated that businesses selling or manufacturing intoxicating liquors were to be considered common nuisances.<sup>82</sup> The Court ultimately upheld the constitutionality of the law.<sup>83</sup> In its decision, the Court addressed the scope and limits of the police power.<sup>84</sup> The *Mugler* Court defined the police power as the power to determine whether measures are necessary or appropriate to protect the public’s morals, health, or safety.<sup>85</sup> The Court found that Kansas could exercise the police power to prohibit the sale or manufacture of alcohol since the regulation had the appropriate motivation of protecting the community from the evils of excessive alcohol consumption.<sup>86</sup> The Court effectively deferred to Kansas’s decision to protect the community through such an act.<sup>87</sup>

*Mugler* also carved out instances in which states may not legitimately exercise police powers, even though there is a strong presumption of validity for statutes enacted to promote public health, safety, and morals.<sup>88</sup> Justice Harlan, writing for the Court, stated that when statutes ostensibly adopted to promote legitimate ends of the police power have “no real or substantial relation to those objects, or is a palpable invasion

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 124.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 125.

<sup>79</sup> *See id.* at 124–26.

<sup>80</sup> *Mugler v. Kansas*, 123 U.S. 623, 654 (1887).

<sup>81</sup> *Id.* at 654–55.

<sup>82</sup> *Id.* at 656.

<sup>83</sup> *See id.* at 661–62.

<sup>84</sup> *See id.* at 660–61.

<sup>85</sup> *Id.* at 661.

<sup>86</sup> *Mugler*, 123 U.S. at 661–62.

<sup>87</sup> *See id.*; Stedfast, *supra* note 67, at 889.

<sup>88</sup> *See* 123 U.S. at 661.

of rights secured by the fundamental law,” courts have a duty to strike down these laws as being incompatible with the Constitution.<sup>89</sup>

Since the *Munn* and *Mugler* decisions, the Court has consistently taken an expansive view of the police power.<sup>90</sup> Courts in general have been very deferential to state and local governmental application of the police power.<sup>91</sup> In *Hadacheck v. Sebastian*, petitioner was convicted of violating a City of Los Angeles ordinance prohibiting anyone from operating a brickyard within the city limits.<sup>92</sup> The Court rejected petitioner’s takings and equal protection claims.<sup>93</sup> The Court’s opinion, delivered by Justice McKenna, demonstrates how deferential the judiciary was willing to be with respect to local regulations under the police power.<sup>94</sup> McKenna described the police power as “one of the most essential powers of government . . . one that is the least limitable.”<sup>95</sup> Accordingly, the *Hadacheck* Court found that police powers were limited only by arbitrary, or unjustly discriminatory, application by state or local government.<sup>96</sup>

*Berman v. Parker* interpreted the police power expansively to promote public welfare.<sup>97</sup> *Berman* concerned the constitutionality of the District of Columbia Redevelopment Act of 1945.<sup>98</sup> The Act authorized the District of Columbia to acquire property in “blighted areas” through the power of eminent domain.<sup>99</sup> The Act described the blighted areas as “injurious to the public health, safety, morals, and welfare.”<sup>100</sup> In order to eliminate the injurious conditions, the Act sought to lease or sell the acquired property for redevelopment purposes.<sup>101</sup> Appellants—whose property was a commercial building, not the sort of slum housing targeted by the Act—contended that the statute amounted to an unconstitutional taking of their property.<sup>102</sup> Appellants

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<sup>89</sup> *Id.*; see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-1 (2d ed. 1988) (discussing the intersection of the police power and substantive due process concerns at the end of the nineteenth century).

<sup>90</sup> See, e.g., *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Berman v. Parker*, 348 U.S. 26, 32–33 (1954); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915).

<sup>91</sup> See *Berman*, 348 U.S. at 32; *Hadacheck*, 239 U.S. at 410.

<sup>92</sup> 239 U.S. at 404–05.

<sup>93</sup> See *id.* at 413–14.

<sup>94</sup> See *id.* at 410.

<sup>95</sup> *Id.*

<sup>96</sup> See *id.* at 411.

<sup>97</sup> EAGLE, *supra* note 7, § 2-4; see 348 U.S. at 33.

<sup>98</sup> 348 U.S. at 28.

<sup>99</sup> *Id.* at 28–29.

<sup>100</sup> *Id.* at 28.

<sup>101</sup> *Id.* at 29.

<sup>102</sup> See *id.* at 31.

argued that their property was being taken for aesthetic and consistency purposes: “[T]o develop a better balanced, more attractive community.”<sup>103</sup>

The Court disagreed with appellants, ruling that the Act fell within the ambit of the police power.<sup>104</sup> The Court adopted a particularly broad police power definition, holding that the traditional uses of the police power— “[p]ublic safety, public health, morality, peace and quiet, law and order”—are only illustrative of the wide scope of the police power.<sup>105</sup> The Court noted that the public welfare was a “broad and inclusive” ideal that incorporated a diverse range of concepts, including spiritual, physical, aesthetic, and monetary values.<sup>106</sup> The Court likened a blighted housing area’s effects on the community to the ways in which sewage could despoil a river.<sup>107</sup>

In addition to the Court’s expansive view of the police power, *Berman* demonstrated the Court’s great degree of deference to legislatures regulating under the police power.<sup>108</sup> The Court declared that it is up to the legislatures’ discretion, not the courts’, to decide upon the means to be employed when pursuing a legitimate end under the police power.<sup>109</sup> As Justice Douglas explained:

The definition [of the police power] is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . .<sup>110</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> *Berman*, 348 U.S. at 32–33.

<sup>105</sup> *Id.* at 32.

<sup>106</sup> *Id.* at 33.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 32; see Nancy Kubasek & Garrett Coyle, *A Step Backward Is Not Necessarily a Step in the Wrong Direction*, 30 VT. L. REV. 43, 51 (2005).

<sup>109</sup> *Berman*, 348 U.S. at 32; Kubasek & Coyle, *supra* note 108, at 51. Under police power analysis, the impact upon property owners is a secondary concern “and only then to gauge whether the impact exceeds some undefined cut-off for excessive diminution in value of the underlying property interest.” Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 549 (2000).

<sup>110</sup> *Berman*, 348 U.S. at 32.

As a result of the *Berman* decision, once a legislature has identified a public welfare purpose under the police power, courts will play a very narrow role, heeding the judgment of the legislatures over their own.<sup>111</sup>

### B. Relationship Between the Police Power and Zoning

State governments regulate private property through land-use controls, often enacted at the municipal level.<sup>112</sup> Municipalities “have no inherent police powers of their own and therefore no inherent power to zone.”<sup>113</sup> Typically, states will delegate to municipalities—through zoning enabling acts—the power to regulate the types of uses and levels of usage that are permissible in districts within the municipality.<sup>114</sup> These zoning enabling acts are predicated upon the power to regulate for health, safety, and welfare under the police powers.<sup>115</sup> Zoning regulations were first enacted “because the common law of nuisance was not adequate to deal with modern problems of urbanization and industrialization.”<sup>116</sup> Zoning is seen as a comprehensive method to defend against noxious uses of property.<sup>117</sup>

Zoning laws were first declared constitutional in *Village of Euclid v. Ambler Realty*.<sup>118</sup> *Euclid* serves as “the basis for modern zoning law.”<sup>119</sup> At issue in *Euclid* was a 1922 ordinance establishing a comprehensive zoning plan in the village of Euclid, Ohio.<sup>120</sup> A property owner harmed by the ordinance brought suit under the Fourteenth Amendment.<sup>121</sup> The property owner had purchased a tract of land, valued at \$10,000, to be used for industrial purposes.<sup>122</sup> At the time of the litigation, the tract was a vacant lot waiting to be developed.<sup>123</sup> The zoning ordinance lim-

<sup>111</sup> See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240–41 (1984); *Berman*, 348 U.S. at 32.

<sup>112</sup> SINGER, *supra* note 5, § 11.1.1.1.

<sup>113</sup> ROHAN, *supra* note 62, § 35.01.

<sup>114</sup> *Id.* § 35.03; SINGER, *supra* note 5, § 11.1.1.1.

<sup>115</sup> SINGER, *supra* note 5, § 11.1.1.1.

<sup>116</sup> GEORGE SKOURAS, TAKINGS LAW AND THE SUPREME COURT: JUDICIAL OVERSIGHT OF THE REGULATORY STATE’S ACQUISITION, USE, AND CONTROL OF PRIVATE PROPERTY 34 (1998).

<sup>117</sup> See *Developments in the Law—Zoning*, 91 HARV. L. REV. 1429, 1449 (1978); Donna Jalbert Patalano, Note, *Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines*, 28 B.C. ENVTL. AFF. L. REV. 683, 687 (2001).

<sup>118</sup> SKOURAS, *supra* note 116, at 35; see *Vill. of Euclid v. Ambler Realty*, 272 U.S. 365, 394–95 (1926).

<sup>119</sup> SKOURAS, *supra* note 116, at 35.

<sup>120</sup> 272 U.S. at 379–80.

<sup>121</sup> *Id.* at 384.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

ited this particular tract to residential uses, thereby significantly reducing its market value.<sup>124</sup>

The Court upheld the Village's zoning ordinance.<sup>125</sup> Justice Sutherland's opinion employed the language of nuisance law in determining whether zoning laws are a legitimate exercise of the police power.<sup>126</sup> Justice Sutherland wrote that, much like nuisance, the question of whether the police power allows a prohibition on certain uses of property via zoning must be determined "in connection with the circumstances and the locality."<sup>127</sup> Sutherland found that the Latin maxim common in nuisance law, "sic utere tuo ut alienum non laedas," may be instructive when determining the application of the police power.<sup>128</sup> He went on to note the considerable communal benefits of zoning industrial uses out of the area.<sup>129</sup> These benefits included increased home safety, reduced traffic, reduced noise levels, and a reduced number of street accidents.<sup>130</sup> The Court, thus, upheld the constitutionality of the zoning ordinance.<sup>131</sup> Justice Sutherland concluded that the ordinance could not be considered "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."<sup>132</sup> In the eighty years that have passed since the *Euclid* decision, courts have consistently found that municipalities may constitutionally use their police power to enact zoning regulations.<sup>133</sup>

While there is a presumption of validity for zoning ordinances,<sup>134</sup> the courts have sometimes struck down zoning ordinances found to place excessively burdensome restrictions on property.<sup>135</sup> In *Nectow v. City of Cambridge*, a landowner challenged a City of Cambridge zoning ordinance which would have divided his property into two different zones.<sup>136</sup> As a result, a 100-foot strip would have been zoned residen-

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<sup>124</sup> *See id.*

<sup>125</sup> *Id.* at 394-95.

<sup>126</sup> *See Vill. of Euclid*, 272 U.S. at 387-88.

<sup>127</sup> *Id.* at 388.

<sup>128</sup> *Id.* at 387. Translated, the maxim holds that you should "use your own property as not to injure that of another." *BALLENTINE'S LAW DICTIONARY* 1178 (3d ed. 1969).

<sup>129</sup> *Vill. of Euclid*, 272 U.S. at 394.

<sup>130</sup> *Id.*

<sup>131</sup> *See id.* at 395.

<sup>132</sup> *Id.* at 395.

<sup>133</sup> *See ROHAN, supra* note 62, § 35.02(3); *see also Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (holding that "[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people").

<sup>134</sup> *ROHAN, supra* note 62, § 35.04(1)(d).

<sup>135</sup> *See Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928).

<sup>136</sup> *Id.* at 185, 186.

tial.<sup>137</sup> The Court struck down the ordinance because there could be no practical use for this 100-foot strip, and so the health, safety, and welfare would not be promoted through such an ordinance.<sup>138</sup>

### III. THE DORMANT COMMERCE CLAUSE AND THE POLICE POWER

The dormant Commerce Clause holds “that state and local laws are unconstitutional if they place an undue burden on interstate commerce.”<sup>139</sup> Article 1, Section 8 of the U.S. Constitution grants Congress the power to regulate interstate commerce.<sup>140</sup> The Constitution itself is silent on the issue of whether states can interfere with interstate commerce, though it does prohibit states from interfering with foreign commerce.<sup>141</sup> The courts have interpreted the Commerce Clause to have a *dormant* aspect that limits the ability of states to regulate economic activities in which “Congress has not affirmatively acted to either authorize or forbid the challenged state activity.”<sup>142</sup> The purpose behind the dormant Commerce Clause was to eliminate the economically protectionist state actions that were common prior to the adoption of the Constitution.<sup>143</sup> As described by Justice Jackson:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regula-

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 187–88.

<sup>139</sup> CHEMERINKSY, *supra* note 10, § 5.3.1.

<sup>140</sup> U.S. CONST. art. I, § 8. (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

<sup>141</sup> TRIBE, *supra* note 89, § 6-2.

<sup>142</sup> *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders*, 48 F.3d 701, 710 (3d Cir. 1995) (quoting *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 392 (3d Cir. 1987)). According to Professor Tribe, the courts should be attentive to protectionist state legislation because “the proper structural role of state lawmakers *is* to protect and promote the interests of their own constituents. That role is one that they will inevitably try to fulfill even at the expense of citizens of other states.” TRIBE, *supra* note 89, § 6-5. The traditional check on legislative power, the ballot box, is unavailable to out-of-state citizens harmed by protectionist state legislation, and thus, it is up to the courts to step in to counter legislative abuses of state power. *See id.*

<sup>143</sup> Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause*, 37 URB. LAW. 907, 916 (2005); Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1207 (1986); *see* COENEN, *supra* note 11, at 209–10.



tions exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.<sup>144</sup>

The concept of the dormant Commerce Clause was first introduced in *Gibbons v. Ogden*.<sup>145</sup> At issue in *Gibbons* was whether New York could grant a steamboat operator the right of exclusive navigation of the waters within the state.<sup>146</sup> Chief Justice Marshall first described commerce as including not merely the exchange of commodities, but “commercial intercourse between nations, and parts of nations.”<sup>147</sup> Marshall found that steamboat navigation fell within the definition of commerce.<sup>148</sup> He concluded that the Commerce Clause was a limit on the power of the states.<sup>149</sup> The Court held that “when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.”<sup>150</sup> Chief Justice Marshall, thus, established interstate commerce as a realm in which Congress had supreme authority and that the states could not encroach upon.<sup>151</sup> He did, however, leave open the door for the limited intersection of state and federal powers over commerce when states are exercising their police power function, namely for “[i]nspection laws, quarantine laws, [or] health laws of every description.”<sup>152</sup>

Since the ruling in *Gibbons*, the Court has had great difficulty deciding the difficult question of whether a state law is unduly burdening interstate commerce or is a valid use of the police power.<sup>153</sup> The Supreme Court has utilized several different schema for addressing the fine line between the police power and the dormant Commerce Clause.<sup>154</sup> The first approach, devised in *Cooley v. Board of Wardens*, attempted to determine whether a particular subject area being regu-

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<sup>144</sup> *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

<sup>145</sup> CHEMERINSKY, *supra* note 10, § 5.3.3.1; *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199–200 (1824).

<sup>146</sup> 22 U.S. (9 Wheat.) at 1–2.

<sup>147</sup> *Id.* at 189–90.

<sup>148</sup> *Id.* at 190.

<sup>149</sup> *See id.* at 199–200.

<sup>150</sup> *Id.*

<sup>151</sup> *See id.*

<sup>152</sup> *Gibbons*, 22 U.S. (9 Wheat.) at 203; *see CHEMERINSKY, supra* note 10, § 5.3.3.1.

<sup>153</sup> CHEMERINSKY, *supra* note 10, § 5.3.3.1.

<sup>154</sup> *See id.* § 5.3.3.1–2.

lated by a state required a uniform, national approach or necessitated a local level of legislation.<sup>155</sup> The analytical framework of *Cooley* proved to be a problematic solution that raised a number of new questions.<sup>156</sup> For example, under the *Cooley* approach, protectionist state legislation that greatly affected interstate commerce was allowable if it was considered a local action.<sup>157</sup> Additionally, the *Cooley* decision failed to address the distinction between national and local legislation.<sup>158</sup>

In *Di Santo v. Pennsylvania*, the Court adopted a new approach for dormant Commerce Clause cases.<sup>159</sup> Justice Butler's opinion held that a state law that "directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed."<sup>160</sup> By implication, state statutes that had only an indirect effect on interstate commerce were deemed valid under *Di Santo*.<sup>161</sup> The *Di Santo* test was difficult to apply in practice.<sup>162</sup> It was often unclear whether a state law was directly or indirectly affecting commerce through its regulations.<sup>163</sup>

The modern dormant Commerce Clause approach has abandoned the rigid, bright-line tests of *Cooley* and *Di Santo* in favor of a more flexible approach: "State regulation affecting interstate commerce will be upheld if (a) the regulation is rationally related to a legitimate state end, and (b) the regulatory burden imposed on interstate commerce, and any discrimination against it, are outweighed by the state interest in enforcing the regulation."<sup>164</sup> In this dual-part analytical framework, the initial question is whether the legislation is rationally related to a legitimate state end.<sup>165</sup> At the heart of the modern approach, however, is the next question: whether the state or local legislation is facially discriminatory.<sup>166</sup> That is, the question is "whether a state law discriminates against out-of-staters or whether it treats all alike

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<sup>155</sup> See *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851); CHEMERINSKY, *supra* note 10, § 5.3.3.1.

<sup>156</sup> See 53 U.S. (12 How.) at 319; CHEMERINSKY, *supra* note 10, § 5.3.3.1.

<sup>157</sup> CHEMERINSKY, *supra* note 10, § 5.3.3.1; see 53 U.S. (12 How.) at 319.

<sup>158</sup> CHEMERINSKY, *supra* note 10, § 5.3.3.1; see 53 U.S. (12 How.) at 319.

<sup>159</sup> See *Di Santo v. Pennsylvania*, 273 U.S. 34, 37 (1927).

<sup>160</sup> *Id.*

<sup>161</sup> See *id.*

<sup>162</sup> See *id.*; CHEMERINSKY, *supra* note 10, § 5.3.3.1.

<sup>163</sup> CHEMERINSKY, *supra* note 10, § 5.3.3.1.

<sup>164</sup> TRIBE, *supra* note 89, § 6-5; see *Di Santo*, 273 U.S. at 37; *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851).

<sup>165</sup> TRIBE, *supra* note 89, § 6-5.

<sup>166</sup> See COENEN, *supra* note 11, at 220.

regardless of residence.”<sup>167</sup> Discriminatory laws are subject to a “virtually *per se* rule of invalidity.”<sup>168</sup> The Court has declared that it will employ the “strictest scrutiny” in facially discriminatory cases.<sup>169</sup> A discriminatory law “will be upheld only if it is proven that the law is necessary to achieve an important government purpose.”<sup>170</sup> State laws may also violate the dormant Commerce Clause with statutes that are facially neutral with respect to out-of-staters, but have a discriminatory effect or a discriminatory purpose.<sup>171</sup>

Even where a state law is not facially discriminatory, or discriminatory in effect or purpose, the courts have found that they can nonetheless run afoul of the dormant Commerce Clause.<sup>172</sup> The courts have striven to shield the national economic market from nondiscriminatory state laws that place an undue burden on interstate commerce.<sup>173</sup> In *Pike v. Bruce Church, Inc.*, the Court devised a balancing test to deal with the issue of nondiscriminatory state laws affecting commerce.<sup>174</sup> The *Pike* Court found that “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>175</sup> In other words, if the burdens a state law places on interstate commerce outweigh the benefits, the law will be struck down.<sup>176</sup> This balancing test provides the courts with a great deal of discretion in their analysis of nondiscriminatory dormant Commerce Clause cases.<sup>177</sup> Unlike facially discriminatory laws, nondiscriminatory laws are generally upheld by the courts.<sup>178</sup>

The *Pike* balancing approach has led to a great deal of confusion over what constitutes a discriminatory effect under the dormant Com-

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<sup>167</sup> CHEMERINSKY, *supra* note 10, § 5.3.3.2.

<sup>168</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); COENEN, *supra* note 11, at 225.

<sup>169</sup> See *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

<sup>170</sup> CHEMERINSKY, *supra* note 10, § 5.3.6.

<sup>171</sup> See COENEN, *supra* note 11, at 231–46.

<sup>172</sup> *Id.* at 253.

<sup>173</sup> *Id.*

<sup>174</sup> CHEMERINSKY, *supra* note 10, § 5.3.5; COENEN, *supra* note 11, at 253–54; see *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>175</sup> 397 U.S. at 142.

<sup>176</sup> See *id.*; *Tribe*, *supra* note 89, § 6-5.

<sup>177</sup> CHEMERINSKY, *supra* note 10, § 5.3.5.

<sup>178</sup> See *id.*

merce Clause.<sup>179</sup> Two cases in particular, *Hunt v. Washington State Apple Advertising Commission* and *Minnesota v. Clover Leaf Creamery Co.*, best illustrate this confusion.<sup>180</sup> In *Hunt*, North Carolina enacted a statute requiring all containers of apples shipped into or sold in the state to bear a U.S. Department of Agriculture grading system or no grade at all.<sup>181</sup> The statute explicitly prohibited state grading systems.<sup>182</sup> Washington State—the largest producer of apples in the United States—used its own extensive, industry-accepted grading system for apples and brought suit claiming that North Carolina’s statute was an unconstitutional burden on interstate commerce.<sup>183</sup> The Court found that North Carolina’s facially neutral statute had a discriminatory effect on interstate commerce.<sup>184</sup> The statute raised the costs for Washington producers doing business in North Carolina, stripped away Washington’s competitive advantage stemming from its rigorous grading system, and “insidiously operate[d] to the advantage of local apple producers.”<sup>185</sup> The Court found that the ostensible benefits of the statute—consumer protection—far outweighed the burdens on commerce.<sup>186</sup> The Court noted that any desire to protect consumers through apple grading was undermined by the terms of the statute because the statute permitted apples with no grade label whatsoever, depriving consumers of information about apple quality.<sup>187</sup>

Though factually similar to *Hunt*, in *Clover Leaf* the Court upheld a Minnesota statute as having only incidental burdens on interstate commerce.<sup>188</sup> *Clover Leaf* concerned a Minnesota statute banning the

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<sup>179</sup> See 397 U.S. at 142; Baker & Konar-Steenberg, *supra* note 9, at 6–16; Catherine Gage O’Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 571–73 (1997).

<sup>180</sup> See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333 (1977); Baker & Konar-Steenberg, *supra* note 9, at 6–7.

<sup>181</sup> 432 U.S. at 337.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 336, 339. North Carolina’s regulatory scheme would have caused a number of problems for Washington’s apple producers, requiring them to either abandon the North Carolina market or alter long-standing procedures. *Id.* at 338. Washington’s producers would have had to remove their labels—giving their product a damaged appearance—repack only those apples shipped to North Carolina, or discontinue entirely the use of their preprinted apple containers. *Id.* These options would have been costly and inefficient for Washington apple producers. *Id.*

<sup>184</sup> *Id.* at 352–53.

<sup>185</sup> *Id.* at 351–52.

<sup>186</sup> *Id.* at 353.

<sup>187</sup> *Hunt*, 432 U.S. at 353.

<sup>188</sup> See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470–72 (1981).

“retail sale of milk in plastic nonreturnable, nonrefillable containers,” while allowing the sale of nonreturnable, nonrefillable containers of a material other than plastic, such as paperboard.<sup>189</sup> Upholding the statute, Justice Brennan first found that the act was not facially discriminatory in that it regulated all retailers without consideration of whether the milk containers were produced in-state or out-of-state.<sup>190</sup> Applying the *Pike* balancing test, Justice Brennan concluded that the burdens imposed on interstate commerce were “relatively minor” compared to the environmental benefits created by the statute.<sup>191</sup> Although Minnesota had a substantial pulpwood industry, which would benefit significantly from the statute, and no plastics industry, which would hurt only out-of-state firms, the Court nonetheless found that “[a] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominately out-of-state industry to a predominately in-state industry. Only if the burden on interstate commerce clearly outweighs the State’s legitimate purposes does such a regulation violate the Commerce Clause.”<sup>192</sup>

The results of *Hunt* and *Clover Leaf* are seemingly contradictory: each involves a facially neutral law, apparently adopted for a legitimate purpose, which had discriminatory effects on interstate commerce.<sup>193</sup> However, in only one case, *Hunt*, was the law struck down.<sup>194</sup> The different outcomes have been explained by noting that there was some evidence of a discriminatory intent by North Carolina in enact-

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<sup>189</sup> *Id.* at 458. The statute cited solid waste management concerns as the impetus for regulating milk containers. *Id.* at 458–59 & n.2.

<sup>190</sup> *Id.* at 471–72.

<sup>191</sup> *Id.* at 472, 473.

<sup>192</sup> *Id.* at 474; *see also* *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978). In *Exxon*, a Maryland statute prohibited petroleum producers or refiners from operating service stations within the state. *Id.* at 119–20. The statute greatly affected citizens of other states, since all the gasoline sold in Maryland was produced in out-of-state refineries. *See id.* at 121. Nevertheless, the Court found that the statute did not violate the dormant Commerce Clause, holding that:

[T]he Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. The absence of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce.

*Id.* at 126.

<sup>193</sup> *See Clover Leaf*, 449 U.S. at 470–72; *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 352–53 (1977); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1241 (1986).

<sup>194</sup> *See* 432 U.S. at 352–53.

ing its statute, whereas Minnesota's intentions were not deemed to be discriminatory.<sup>195</sup> Constitutional scholar Erwin Chemerinsky has said that laws will likely be found to have a discriminatory effect if they exclude all out-of-staters from a certain market within the state, place costs on out-of-staters that are not borne by in-staters as well, or are motivated by economic protectionism.<sup>196</sup>

The Supreme Court has yet to apply its dormant Commerce Clause analysis to zoning regulations.<sup>197</sup> In recent years, a number of zoning decisions with dormant Commerce Clause implications have begun to appear in federal circuit and district courts.<sup>198</sup> The courts have upheld these zoning regulations, finding that they do not impermissibly burden interstate commerce.<sup>199</sup> In *Georgia Manufactured Housing Ass'n v. Spalding County*, Spalding County amended its zoning ordinance to require that manufactured (mobile) homes have a certain roof pitch.<sup>200</sup> The district court held that the roof pitch requirement caused problems for housing manufacturers, both in and out of Georgia, and increased costs for members of the housing industry.<sup>201</sup> Reversing the district court's decision, the U.S. Court of Appeals for the Eleventh Circuit held that the zoning regulation did not impermissibly burden interstate commerce because the costs imposed were the same for both in-state and out-of-state manufacturers.<sup>202</sup>

In a similar case, *Texas Manufacturing Housing Ass'n v. City of Nederland*, the City of Nederland denied a lot owner a permit to install a U.S. Department of Housing and Urban Development HUD-code manufactured home on his property, determining the manufactured

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<sup>195</sup> Baker & Konar-Steenberg, *supra* note 9, at 7. Confusion exists as to whether *Hunt* was even decided as a case about discriminatory effect, as *Clover Leaf* seems to place it in the discriminatory purpose camp. *Id.*

<sup>196</sup> CHEMERINSKY, *supra* note 10, § 5.3.4. Under Chemerinsky's framework, the statute in *Clover Leaf* was upheld because it did not prevent out-of-state companies from selling milk within Minnesota, though it did disadvantage out-of-state plastics companies. *Id.*

<sup>197</sup> See Baker & Konar-Steenberg, *supra* note 9, at 3.

<sup>198</sup> See *Ga. Manufactured Hous. Ass'n v. Spalding County*, 148 F.3d 1304, 1308 (11th Cir. 1998); *Tex. Manufactured Hous. Ass'n v. City of Nederland*, 101 F.3d 1095, 1104 (5th Cir. 1996); *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 994 (E.D. Cal. 2006); Baker & Konar-Steenberg, *supra* note 9, at 2–3 & n.1.

<sup>199</sup> See *Ga. Manufactured Hous. Ass'n*, 148 F.3d at 1308; *Tex. Manufactured Hous. Ass'n*, 101 F.3d at 1104; *Wal-Mart Stores*, 483 F. Supp. 2d 1012–20.

<sup>200</sup> 148 F.3d at 1306.

<sup>201</sup> *Id.* at 1308.

<sup>202</sup> *Id.* (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127–28 (1978)). The court also held that any resulting increase in price to the consumer due to the ordinance related to the regulation's merits and not to its burden on interstate commerce. *Id.*

home was a “trailer coach.”<sup>203</sup> Nederland’s zoning ordinance prohibited trailer coaches on any lot except within trailer parks.<sup>204</sup> Plaintiff contended that HUD-code manufactured housing was an out-of-state interest, as many are built outside Texas and imported into the state, that was impermissibly burdened by the zoning ordinance.<sup>205</sup> The U.S. Court of Appeals for the Fifth Circuit, affirming the district court’s grant of summary judgment, found that the zoning ordinance burdened in-state and out-of-state interests equally and that plaintiff had not shown that in-state businesses will supply housing instead of HUD-code manufactured housing.<sup>206</sup>

#### IV. FAST FOOD ZONING ORDINANCES WOULD BE UPHOLD UNDER POLICE POWER AND DORMANT COMMERCE CLAUSE ANALYSES

Fast food zoning ordinances would likely be a valid application of a local government’s police power.<sup>207</sup> In addition, such ordinances would not have discriminatory effects under the *Pike v. Bruce Church, Inc.* balancing approach to the dormant Commerce Clause.<sup>208</sup>

The use of zoning ordinances to exclude fast food restaurants—with the promotion of public health as the sole justification—would be a permissible application of the police power by a municipality.<sup>209</sup> Obesity rates in the United States have risen dramatically in the past half century.<sup>210</sup> The obesity rate in the United States is, at present, higher than any other industrialized country.<sup>211</sup> The obesity rate for U.S. adults has doubled since the early 1960s, while the childhood obesity rate has

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<sup>203</sup> 101 F.3d at 1098.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1102.

<sup>206</sup> *Id.* at 1104. Recently, in *Wal-Mart Stores v. City of Turlock*, the discount retailer chain brought suit against the City of Turlock over a zoning regulation that prohibited certain types of large-scale “discount superstores,” alleging that the City was attempting to “protect local retailers from competition in violation of the Commerce Clause.” 483 F. Supp. 2d 987, 994 (E.D. Cal. 2006). The court granted the City’s motion for summary judgment, holding that such a zoning regulation was facially neutral, did not have a discriminatory effect, did not increase costs for out-of-state competitors, did not deny out-of-state businesses access to a local market, and satisfied the *Pike* balancing analysis. *Id.* at 1011–20.

<sup>207</sup> See *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Berman v. Parker*, 348 U.S. 26, 32–33 (1954); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915).

<sup>208</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Ga. Manufactured Hous. Ass’n v. Spalding County*, 248 F.3d 1304, 1308 (11th Cir. 1998); *Tex. Manufactured Hous. Ass’n.*, 101 F.3d at 1104.

<sup>209</sup> See *Vill. of Belle Terre*, 416 U.S. at 9; *Berman*, 348 U.S. at 32–33; *Hadacheck*, 239 U.S. at 410.

<sup>210</sup> See SCHLOSSER, *supra* note 1, at 240.

<sup>211</sup> *Id.*

also doubled since the late 1970s.<sup>212</sup> In total, around forty-four million adults are obese, while six million are “super-obese.”<sup>213</sup>

This level of obesity can lead to a variety of life-threatening medical conditions such as heart disease, hypertension, and diabetes.<sup>214</sup> Obesity places a significant strain on the U.S. health care system.<sup>215</sup> Obesity has an impact on direct health care costs for preventive, diagnostic, and treatment services, as well as indirect costs relating to morbidity and mortality.<sup>216</sup>

Recent research has suggested that the built environment may have a strong impact on obesity.<sup>217</sup> Much of the American landscape provides a bounty of “inexpensive, high-energy, good-tasting food that is available continuously throughout the day.”<sup>218</sup> This landscape, when combined with increasingly sedentary lifestyles, has contributed to the gradual increase in obesity.<sup>219</sup> One of the most important ways in which the growing tide of obesity can be stopped is to create built environments that promote healthier lifestyle choices.<sup>220</sup> Alternatives to fast food within a community, such as supermarkets or grocery stores, tend to increase consumption of healthier foods, as they typically offer more nutritious food at lower prices than fast food restaurants.<sup>221</sup>

A zoning ordinance excluding fast food restaurants as a matter of public health would fall within the purview of a municipality’s police power.<sup>222</sup> As stated in *Berman v. Parker*, the uses of the police power for

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* The super-obese weigh at least one hundred pounds more than what would be considered normal for their height and weight. *Id.*

<sup>214</sup> See Stanford Hospital & Clinics, *supra* note 15.

<sup>215</sup> See Centers for Disease Control and Prevention, Overweight and Obesity: Economic Consequences, [http://www.cdc.gov/nccdphp/dnpa/obesity/economic\\_consequences.htm](http://www.cdc.gov/nccdphp/dnpa/obesity/economic_consequences.htm) (last visited Mar. 27, 2008).

<sup>216</sup> *Id.*

<sup>217</sup> Hill et al., *supra* note 4.

<sup>218</sup> *Id.* (citation omitted).

<sup>219</sup> See *id.*

<sup>220</sup> See Metta Winter, *The Built Environment Can Encourage or Obstruct Healthful Behavior*, HUMAN ECOLOGY, Dec. 2005, at 4, available at [http://www.human.cornell.edu/chc/Outreach/upload/HEMag33\\_3.pdf](http://www.human.cornell.edu/chc/Outreach/upload/HEMag33_3.pdf).

<sup>221</sup> See MAIR ET AL., *supra* note 3, at 17–18; Perdue et al., *supra* note 57, at 560.

<sup>222</sup> See *Berman v. Parker*, 348 U.S. 26, 32–33 (1954); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *Mugler v. Kansas*, 123 U.S. 623, 662 (1887). Prevention of obesity “requires changes in individual behavioral patterns as well as eliminating environmental barriers to healthy food choices and active lifestyles.” Marion Nestle & Michael F. Jacobson, *Halting the Obesity Epidemic: A Public Health Policy Approach*, in LAW AND THE HEALTH SYSTEM, *supra* note 32, at 207, 208. This Note will not address the difficult and important question of whether municipalities should interfere with individual behavioral patterns in enacting zoning ordinances of this sort. For discussion on this subject, compare Richard A.



the public welfare is a “broad and inclusive” concept.<sup>223</sup> Moreover, the police power has long been explicitly tied to a notion of public health.<sup>224</sup> Local governments have a clear public interest in reducing or eliminating restaurants that may be significant contributors to a life-threatening condition: obesity.<sup>225</sup>

The Supreme Court has plainly stated its preference for deferring to the judgment of legislative bodies in police power cases.<sup>226</sup> If a community were to enact a fast food zoning ordinance on public health grounds, a court would likely defer to the municipality’s discretion as to the means employed to reach the legitimate end of reducing public obesity.<sup>227</sup> Thus, fast food zoning would likely be upheld as a valid exercise of the police power even if there are other available obesity-reducing options.<sup>228</sup> The use of the police power, the “least limitable” of governmental powers,<sup>229</sup> would only be struck down if it had no substantial relation to public health.<sup>230</sup> A fast food zoning ordinance enacted to combat obesity, would almost certainly be upheld under the discretionary standard employed in police power cases.<sup>231</sup>

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Epstein, *Let the Shoemaker Stick to His Last: A Defense of the “Old” Public Health*, in LAW AND THE HEALTH SYSTEM, *supra* note 32, at 59, 66–67, with Lawrence O. Gostin & M. Gregg Bloche, *The Politics of Public Health: A Response to Epstein*, in LAW AND THE HEALTH SYSTEM, *supra* note 32, at 69, 73–76 (discussing the degree to which governments should intervene to protect public health).

<sup>223</sup> 348 U.S. at 33.

<sup>224</sup> *See id.* at 32; *Mugler*, 123 U.S. at 661; *EAGLE*, *supra* note 7, § 2-3.

<sup>225</sup> *See Berman*, 348 U.S. at 32–33.

<sup>226</sup> *See id.* at 32, 33; *Hadacheck*, 239 U.S. at 410; *Mugler*, 123 U.S. at 661.

<sup>227</sup> *See Berman*, 348 U.S. at 32; *Hadacheck*, 239 U.S. at 410; *Mugler*, 123 U.S. at 661.

<sup>228</sup> *See Berman*, 348 U.S. at 32; *Hadacheck*, 239 U.S. at 410; *Mugler*, 123 U.S. at 661. The Court has indicated that the viability of a less restrictive alternative may factor in a dormant Commerce Clause analysis for determining the extent of the burden placed on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). However, the Supreme Court has yet to strike down a nondiscriminatory law because the ends could have been achieved through a less restrictive alternative. *CHEMERINSKY*, *supra* note 10, § 5.3.5.

<sup>229</sup> *Hadacheck*, 239 U.S. at 410.

<sup>230</sup> *See Mugler*, 123 U.S. at 661.

<sup>231</sup> *See Berman*, 348 U.S. at 32–33; *Hadacheck*, 239 U.S. at 410; *Mugler*, 123 U.S. at 661–62. Some have argued that “[t]he traditional justifications for the use of police power in the case of obesity are much weaker because the causal link between any given intervention and reducing obesity is questionable.” Edward P. Richards III, *Is Obesity a Public Health Problem?*, in LAW AND THE HEALTH SYSTEM, *supra* note 32, at 219, 220. This argument, however, is unpersuasive, given the deference the courts have shown legislative action under the police power. *See, e.g., Berman*, 348 U.S. at 32; *Hadacheck*, 239 U.S. at 410; *Mugler*, 123 U.S. at 661. If a legislative determination were made linking obesity, the built environment, and zoning, a court would only strike down the ordinance if it was “arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

While fast food zoning would likely survive police power analysis, it may nonetheless face a challenge under the dormant Commerce Clause.<sup>232</sup> The first step in any dormant Commerce Clause analysis is to determine whether the state action is rationally related to a legitimate state end.<sup>233</sup> The Court has consistently held that legislation enacted by a state or municipality under the police power, such as a zoning ordinance, is rationally related to a legitimate state end.<sup>234</sup> The next step, then, is to determine whether under the *Pike* balancing test the burdens imposed on interstate commerce by a fast food zoning ordinance would outweigh its purported benefits.<sup>235</sup>

As issues of local concern with potential national implications, zoning regulations are beginning to emerge as an important subject matter in dormant Commerce Clause jurisprudence.<sup>236</sup> The Supreme Court will likely chose to address the issue of zoning and the dormant Commerce Clause as more communities begin to use zoning to achieve such goals as preserving local character or curbing the obesity epidemic.<sup>237</sup> A fast food zoning ordinance would be a governmental action in response to a national obesity problem that was reflective of a community's needs and values.<sup>238</sup> A zoning regulation, by its very nature, affects commercial interests in that it can place conditions on which commercial uses are permissible on a particular parcel; thus, zoning regulations have the potential to raise barriers to interstate commerce, implicating the dormant Commerce Clause.<sup>239</sup>

Fast food restaurants are typically either part of a national restaurant chain or a franchise of such a national chain.<sup>240</sup> They are enormous enterprises in terms of both their sheer numbers and net prof-

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<sup>232</sup> See Baker & Konar-Steenberg, *supra* note 9, at 2–3. Due to the vast and complex area of dormant Commerce Clause jurisprudence, this Note will not purport to be a definitive treatment of zoning regulations under the dormant Commerce Clause. Rather, this analysis will focus on zoning in light of several *Pike* balancing cases in the context of discriminatory effects upon interstate commerce.

<sup>233</sup> TRIBE, *supra* note 89, § 6-5.

<sup>234</sup> See Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 418 (1998).

<sup>235</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); TRIBE, *supra* note 89, § 6-5. For the purposes of this section, a fast food zoning ordinance is assumed not to be facially discriminatory.

<sup>236</sup> See Baker & Konar-Steenberg, *supra* note 9, at 2.

<sup>237</sup> See *id.* at 2–3.

<sup>238</sup> See *id.* at 39–40.

<sup>239</sup> See *id.*

<sup>240</sup> See SCHLOSSER, *supra* note 1, at 94–98 (discussing the use of franchising in the fast food industry).

its.<sup>241</sup> As commercial enterprises, they are participating in practically every local market in the country.<sup>242</sup> A fast food zoning ordinance would effectively prevent major national commercial actors from participating in local markets, which would have an indirect effect on interstate commerce.<sup>243</sup> A fast food zoning ordinance could be seen as promoting local restaurants at the expense of out-of-state fast food chains.<sup>244</sup> Fast food chains could argue that municipalities are motivated by economic protectionism, with any benefits to public health as a subterfuge to avoid invalidity under the dormant Commerce Clause.<sup>245</sup> Out-of-state restaurant chains may also contend that the burdens imposed on interstate commerce far outweigh the benefits to public health, arguing that the connection between obesity and the built environment are tenuous.<sup>246</sup> The narrowly local concern of a fast food zoning ordinance—protecting a community's health—would render it susceptible to a challenge under the dormant Commerce Clause.<sup>247</sup>

Though a fast food zoning ordinance may be vulnerable under the dormant Commerce Clause, such an ordinance would likely survive under the *Pike* balancing test employed in *Hunt v. Washington State Apple Commission*, *Minnesota v. Clover Leaf Creamery Co.*, and other cases.<sup>248</sup> Most significantly, zoning ordinances to improve public health by excluding fast food restaurants would not have a discriminatory intent.<sup>249</sup> A fast food zoning ordinance's primary aim would be to reduce unhealthy food options within a community and promote healthier lifestyles in the face of an obesity epidemic.<sup>250</sup> Moreover, economic protectionism, one of the rationales behind the dormant Commerce Clause,

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<sup>241</sup> See *id.* at 3–5.

<sup>242</sup> See *id.* at 3.

<sup>243</sup> See *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942) (holding that Congress could regulate a farmer's production of a trivial amount of wheat for personal consumption because the aggregate effect of such production could significantly affect interstate commerce); *Baker & Konar-Steenberg*, *supra* note 9, at 41.

<sup>244</sup> See CHEMERINSKY, *supra* note 10, § 5.3.4.

<sup>245</sup> See *id.*

<sup>246</sup> See *Richards*, *supra* note 231, at 220.

<sup>247</sup> See *Baker & Konar-Steenberg*, *supra* note 9, at 41.

<sup>248</sup> See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126–27 (1978); *Hunt v. Wash. State Apple Comm'n*, 432 U.S. 333, 350–53 (1977); CHEMERINSKY, *supra* note 10, § 5.3.5. See generally Denning & Lary, *supra* note 143 (discussing how a similar type of regulation, size-capping ordinances, would fare under a dormant Commerce Clause analysis).

<sup>249</sup> See *Clover Leaf*, 449 U.S. at 471–73; *Exxon*, 437 U.S. at 126; *Hunt*, 432 U.S. at 351–52; CHEMERINSKY, *supra* note 10, § 5.3.4.

<sup>250</sup> See *Clover Leaf*, 449 U.S. at 473.

would not be a motivating force behind a fast food zoning ordinance.<sup>251</sup> All burdens placed on interstate commerce would be incidental to the overriding goal of changing the built environment to promote healthier lifestyles.<sup>252</sup>

For instance, suppose a hypothetical city, Clarksville, enacted a zoning ordinance that prohibited restaurants primarily serving ready-to-consume foods in paper, plastic, or other disposable containers for consumption on or off premises, as well as restaurants directly serving food to customers in motor vehicles.<sup>253</sup> Clarksville's legislature justified the use restriction as necessary to protect the health and welfare of its citizens through healthier dietary options.<sup>254</sup> Clarksville's hypothetical ordinance would not be driven by an intent to protect the local restaurant industry, though surely national fast food chains would be hampered in their ability to open new restaurants within that particular zone.<sup>255</sup> Further, such a fast food zoning ordinance would not impose costs on out-of-staters not borne by in-staters.<sup>256</sup> Clarksville's ordinance would affect locally owned fast food restaurants the same as out-of-state fast food restaurants in that both would be expressly prohibited within the zone.<sup>257</sup> The costs imposed on local purveyors—the prohibition of a certain type of restaurant—would be equal to those of out-of-state chains.<sup>258</sup> In-state restaurants would be barred from operating in the *fast food* mode—a harm proportional to that of any out-of-state enterprise.<sup>259</sup> Since fast food is a national enterprise, dominated by large corporations likely to be out-of-state, Clarksville's ordinance logically would have a far greater impact on out-of-staters.<sup>260</sup> Because of this disparity in impact, more business could potentially shift to local restaura-

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<sup>251</sup> See *id.* at 471–73; *Exxon*, 437 U.S. at 126.

<sup>252</sup> See *Clover Leaf*, 449 U.S. at 473; *Exxon*, 437 U.S. at 126.

<sup>253</sup> See CONCORD, MASS., ZONING BYLAW § 4.7.1 (2006), available at [http://www.concordnet.org/Pages/ConcordMA\\_BOA/zone/2006ZoningBylaw.pdf](http://www.concordnet.org/Pages/ConcordMA_BOA/zone/2006ZoningBylaw.pdf).

<sup>254</sup> See *Berman v. Parker*, 348 U.S. 26, 32–33 (1954); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394–95 (1926).

<sup>255</sup> See *Clover Leaf*, 449 U.S. at 472–73.

<sup>256</sup> *Contra Hunt*, 432 U.S. at 351–53.

<sup>257</sup> See *Ga. Manufactured Hous. Ass'n v. Spalding County*, 148 F.3d 1304, 1308 (11th Cir. 1998); *Tex. Manufactured Hous. Ass'n v. City of Nederland*, 101 F.3d 1095, 1104 (5th Cir. 1996).

<sup>258</sup> See *Ga. Manufactured Hous.*, 148 F.3d at 1308; *Tex. Manufactured Hous.*, 101 F.3d at 1104.

<sup>259</sup> See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978); *Ga. Manufactured Hous.*, 148 F.3d at 1308; *Tex. Manufactured Hous.*, 101 F.3d at 1104. The Court has noted that “major in-state interests adversely affected . . . [are] a powerful safeguard against legislative abuse.” *Clover Leaf*, 449 U.S. at 473 n.17.

<sup>260</sup> See SCHLOSSER, *supra* note 1, at 3–5, 94–98.

teurs filling the gap created by an exclusionary fast food ordinance.<sup>261</sup> However, under *Clover Leaf*, facially nondiscriminatory regulations serving legitimate purposes do not violate the dormant Commerce Clause merely for shifting business to in-state enterprises.<sup>262</sup> Local action will only violate the dormant Commerce Clause when the burden clearly outweighs the legitimate purposes behind the action.<sup>263</sup> Courts have consistently found that legislative action resulting in a shift towards in-state business does not render the action void under the *Pike* balancing approach.<sup>264</sup>

The Clarksville ordinance also would not exclude out-of-state chains from operating within the local restaurant market.<sup>265</sup> A national chain would not be entirely barred from operating a restaurant in Clarksville, rather they would be prohibited from operating a particular subset of the restaurant industry.<sup>266</sup> The Supreme Court has held that there is no constitutionally protected right to operate a particular mode of business.<sup>267</sup> It is the interstate market, rather than any particular businesses, that is protected from burdens on interstate commerce.<sup>268</sup> Clarksville's hypothetical ordinance would not exclude all out-of-staters from their local market.<sup>269</sup> Out-of-state fast food chains, as well as local fast food restaurants, would be free to operate any other type of restaurant within Clarksville.<sup>270</sup> In fact, many of the national fast food chains, such as McDonald's and Wendy's, are beginning to acquire and operate secondary restaurant chains that might avoid being classified as fast food restaurants.<sup>271</sup> Major chains may thereby retain their competitive

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<sup>261</sup> See *Clover Leaf*, 449 U.S. at 474.

<sup>262</sup> *Id.*

<sup>263</sup> See *id.*; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Ga. Manufactured Hous.*, 148 F.3d at 1308; *Tex. Manufactured Hous.*, 101 F.3d at 1102.

<sup>264</sup> See *Clover Leaf*, 449 U.S. at 474; *Exxon Corp.*, 437 U.S. at 127.

<sup>265</sup> See *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1016 (E.D. Cal. 2006).

<sup>266</sup> See *Exxon*, 437 U.S. at 127–28; *Wal-Mart*, 483 F. Supp. 2d at 1012.

<sup>267</sup> See *Exxon*, 437 U.S. at 127–28 (holding that the dormant Commerce Clause does not “protect[] the particular structure or methods of operation in a retail market . . . the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations”) (citation omitted); *Wal-Mart*, 483 F. Supp. 2d at 1012 (holding that an ordinance prohibiting discount superstores did not violate the dormant Commerce Clause because it left the “market open to all local or foreign retailers . . . except in the discount superstore format”).

<sup>268</sup> See *Tex. Manufactured Hous.*, 101 F.3d at 1104 (quoting *Exxon*, 437 U.S. at 127–28).

<sup>269</sup> See *Wal-Mart*, 483 F. Supp. 2d at 1017.

<sup>270</sup> See *Exxon*, 437 U.S. at 127; *Wal-Mart*, 483 F. Supp. 2d at 1017.

<sup>271</sup> See Carolyn Walkup, *Fast Feeders Expand Their Growth Potential*, NATION'S RESTAURANT NEWS, Feb. 5, 2007, at 25; see also Davide Dukceovich, *McDonald's Grows Up*, FORBES.COM, May 3, 2002, <http://www.forbes.com/companies/2002/05/03/0503fastfood.html>.

advantage in the restaurant industry and continue to operate within municipalities adopting fast food zoning ordinances.<sup>272</sup>

The Fifth and Eleventh Circuit Courts of Appeals decisions concerning zoning and the dormant Commerce Clause support the claim that a fast food zoning ordinance would be upheld.<sup>273</sup> Fast food zoning would be akin to both the zoning ordinances at issue in *Georgia Manufactured Housing Ass'n v. Spalding County* and *Texas Manufactured Housing Ass'n v. City of Nederland*.<sup>274</sup> In each case, zoning ordinances were in place that arguably discriminated against out-of-state manufactured home producers in favor “of the site-built home market, which, by its very nature, is local and therefore strictly in-state.”<sup>275</sup> The courts rejected the notion that these zoning ordinances violated the dormant Commerce Clause, finding that the burdens were the same for both in-state and out-of-state businesses and that the claimants had not demonstrated that housing in the place of manufactured homes would be provided by in-state actors.<sup>276</sup> While restaurants similarly operate to fill the food needs of a local community, restaurants are even less strictly in-state actors, as the restaurant industry is far more conducive to being managed by out-of-state corporations than on-site home construction.<sup>277</sup> Accordingly, a fast food zoning ordinance would favor in-state business even less than the zoning ordinances that were challenged on the basis of discriminating against out-of-state business and upheld in *Georgia Manufactured Housing Ass'n* and *Texas Manufactured Housing Ass'n*.<sup>278</sup> As such, a fast food zoning ordinance would likely be upheld under the dormant Commerce Clause because any burden imposed on interstate commerce would not be clearly excessive relative to the local benefits.<sup>279</sup>

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For instance, Wendy's has a majority interest in a San Francisco-based, sit-down Italian restaurant chain, Pasta Pomodoro. Walkup, *supra*, at 25.

<sup>272</sup> See *Wal-Mart*, 483 F. Supp. 2d at 1017.

<sup>273</sup> See *Ga. Manufactured Hous. Ass'n v. Spalding County*, 148 F.3d 1304, 1308 (11th Cir. 1998); *Tex. Manufactured Hous.*, 101 F.3d at 1104.

<sup>274</sup> See *Ga. Manufactured Hous.*, 148 F.3d at 1306; *Tex. Manufactured Hous.*, 101 F.3d at 1098.

<sup>275</sup> See *Ga. Manufactured Hous.*, 148 F.3d at 1308; *Tex. Manufactured Hous.*, 101 F.3d at 1104.

<sup>276</sup> See *Ga. Manufactured Hous.*, 148 F.3d at 1308; *Tex. Manufactured Hous.*, 101 F.3d at 1104.

<sup>277</sup> See *Ga. Manufactured Hous.*, 148 F.3d at 1308; *Tex. Manufactured Hous.*, 101 F.3d at 1104.

<sup>278</sup> See *Ga. Manufactured Hous.*, 148 F.3d at 1308; *Tex. Manufactured Hous.*, 101 F.3d at 1104.

<sup>279</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Ga. Manufactured Hous.*, 148 F.3d at 1308; *Tex. Manufactured Hous.*, 101 F.3d at 1104.

## CONCLUSION

A fast food zoning ordinance, predicated on public health grounds, would likely be upheld as a valid exercise of the police power. Fast food zoning would serve the legitimate state purpose of reducing the alarmingly high obesity rate in the United States. As a legitimate exercise of the police power to zone for the health, safety, and welfare, a zoning ordinance of this type would likely withstand a dormant Commerce Clause challenge. The burdens on interstate commerce would not be excessive in relation to the local benefits. A fast food zoning ordinance would not be motivated by economic protectionism, place costs on out-of-state interests not borne by in-state interests, or exclude out-of-state actors from a certain market.

The obesity epidemic has significantly strained the nation's health-care system. A change in the built environment, facilitated by zoning ordinances, could alter the landscape in our communities and result in more active, healthier lifestyles. Communities should be encouraged to enact creative solutions to a growing problem that has no end in sight.